

HARDY & ELLISON, P.C.

CONSULTING ATTORNEYS

SUITE 100

9306 OLD KEENE MILL ROAD

BURKE, VIRGINIA 22015

(703) 455-3600

TELECOPIER (703) 455-3603

G. TODD HARDY
(ADMITTED IN D.C. & VA.)
(703) 455-3601 DIRECT

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JUN 29 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MARK C. ELLISON
(ADMITTED IN FL & GA ONLY)
(703) 455-3602 DIRECT

June 29, 1994

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

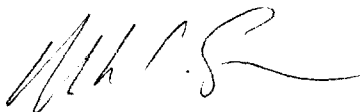
Re: CS Docket No. 94-48

Dear Mr. Caton:

Enclosed for filing herewith please find an original plus ten copies of Comments of Consumer Satellite Systems, Inc., Programmers Clearing House, Inc. and Satellite Receivers Ltd. in the above referenced Docket in response to the Notice of Inquiry release May 19, 1994. Please accept this for filing and provide each Commissioner with a personal copy.

Thank you.

Sincerely,



Mark C. Ellison

MCE/cln

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

JUN 29 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 19)
of the Cable Television)
Consumer Protection and)
Competition Act of 1992)
) CSS Docket No. 94-48
Annual Assessment of the Status)
of Competition in the Market for)
the Delivery of Video Programming)

COMMENTS OF CONSUMER SATELLITE SYSTEMS, INC., PROGRAMMERS
CLEARING HOUSE, INC., AND SATELLITE RECEIVERS, LTD.
TO
NOTICE OF INQUIRY

I. Introduction

The following are the comments of Consumer Satellite Systems, Inc. of 112 Shadowlawn Drive, Fishers, IN 46038, Programmers Clearing House, Inc. of 300 East 50th Street, North, Sioux Falls, SD 57104, and Satellite Receivers, Ltd. of 1740 Cofrin Drive, Green Bay, WI 54308 in response to the above referenced Notice of Inquiry ("NOI"). (These parties are collectively referred to herein as the "Packagers".)

All of the Packagers are engaged in the business of procuring, packaging, and distributing satellite/cable video programming to the C-band home satellite dish ("HSD") market on both a direct retail and wholesale basis. The Packagers are competitors to one another and compete with cable operators and other HSD packagers throughout the United States. Collectively, the Packagers serve approximately 250,000 HSD owners in all fifty states.

As evidenced by the information which follows, the Packagers are severely impacted in their ability to compete by pricing, terms, conditions, and policies imposed

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by many video programming vendors, both vertically integrated and non-vertically integrated. Despite the passage of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act") and the rules promulgated thereunder set forth as 47 C.F.R. 76.1000 et seq. (the "Rules"), the prices that the Packagers and other HSD packagers are required to pay for many satellite cable programming and satellite broadcast programming services remain, for lack of a better term, ridiculously high relative to the rates paid by cable systems and other multichannel video programming distributors ("MVPDs").

As will be discussed below, the services that are performed by the Packagers are no different than those performed by cable operators and do not result in cost factors for the programmers which would justify the price differentials faced by HSD Packagers. In fact, the cost of serving HSD packagers may be less than the cost of serving the cable operator, and yet, it is the HSD packager who must pay exorbitant premiums.

Hopefully, the following will provide the Commission with some of the information it is seeking and convey to the Commission and Congress, the vital importance of continued, if not expanded oversight and control of the market for the delivery of video programming.

II. Current State of Cable Competition in the Video Marketplace

There is no question that the level of competition in the video marketplace will grow in the coming months and years with the advent and expansion of high and medium powered direct broadcast satellite (DBS) services. Video dial tone service from telephone companies may also prove to be a competitive force in the market. HSD hopes to be a competitive factor as well, but it can be such only if balance and fairness are brought to the market for video programming.

HSD has grown somewhat more competitive over the years as consumers have learned about the quality and diverse programming availability offered by home satellite systems. Prices for HSD systems have fallen steadily since the birth of the industry in the early 1980's. Today, the consumer can purchase and install a C-band system for less than \$1,000 or have a top-of-the-line system for about \$2500. In most cases, financing is available which permits the customer to purchase the system and

some programming services for a monthly fee in the range of \$30 to \$50. A new generation of C-band satellites has also been launched in recent months with significantly increased power. As satellite power has increased, the size of receive dishes has been reduced, some to as small as a four foot diameter for use in some parts of the country.

According to the June 15, 1994 edition of Satellite Business News: HSD system sales for 1994 (through May, 1994) total 148,144, bringing the total of U.S. system sales to 3,755,962. The total number of VideoCipher™ subscribers is 1,884, 896. Because HSD owners must have an authorized VideoCipher decoder to receive scrambled satellite cable programming, it is this latter number which should be used by the Commission in evaluating HSD penetration and competitiveness in the market.

However, cable remains the clearly dominant player. As of October 1, 1993, it had, according to the 1994 Television & Cable Factbook, penetrated more than 56 million households. Satellite Business News (6/15/94), reporting the results of a survey conducted by The Times Mirror, states that satellite TV penetration is 6 percent in the South, 2 percent in the East, 5 percent in the West, and 4 percent in the Midwest. It is submitted that the ability of HSD to become a strong and viable competitor continues to be hampered by the disparity in rates it must pay for programming services.

III. The Conduct and Practices of Programming Vendors.

A small minority of video programming vendors have responded to the 1992 Act by making their services available to HSD packagers at or near cable rates. Others have dropped their prices, but remain at multiples of two to almost five times the highest cable rates. Others, including non-vertically integrated programmers which are unaffected by the 1992 Act, have not changed pricing or policies in any notable manner since the Act's passage.

The Packagers have been presented with and, in many cases, have accepted new programming contracts since November 15, 1993. Some of the programmers have met the expectations of the 1992 Act by offering rates at or near their top cable rates. Notable "good actors" in this regard are Discovery, Country Music Television, The Nashville Network, and the Family Channel. MTV, VH-1, and Nickelodeon have also

made significant strides away from discriminatory pricing. Others have moved in the right direction, but not far enough and still others have made token gestures, if that.

The Packagers are planning to bring a number of program pricing cases to the Commission within the next several weeks. Most of those cases will involve programming agreements entered into after November 15, 1993. The acceptance of new agreements after the effective date of the Rules should not be taken as an admission of reasonableness of the terms of the new agreements or a waiver of any right to bring a complaint at the Commission. In every case, the Packagers felt that they had to accept the new agreements when offered and then step back and evaluate the fairness of those deals. The Commission may see why new agreements were accepted and why those agreements should still be subject to scrutiny when it examines Exhibit A to these comments.

Exhibit A is a chart with four columns: (1) programming vendor (with affiliation, if any); (2) top cable rate for that service; (3) percent change of a "sample" HSD rate (1993 vs. 1994); and (4) the HSD rate expressed as a percentage of the top cable rate for each service. In cases where a programmer's HSD rate card contains variable rates based on penetration and volume discounts, a good faith effort has been made to present a sample HSD rate which is neither at the top of the rate card nor at the bottom. Generally, counsel for the Packagers sought to utilize HSD rates which are typical of the Packagers' experience - in some cases an average was used, in other cases an approximate median rate among the three Packagers. Similarly, the percentage in rate changes between 1993 and 1994 and the percentage difference between HSD and cable rates would vary depending upon which rate was used from the HSD rate card. Again, however, the Packagers would submit that the data provided presents a fair and reasonable depiction of the present situation in the marketplace. In fact, it might have more accurate to have presented the highest HSD rate against the top cable rate and shown even higher discrepancies. [It is noted that the Packagers did not share any specific rate information among themselves and have not presented detailed information in these comments in consideration of confidentiality obligations. The Packagers would seek to provide detailed information to the Commission under acceptable confidentiality terms.]

As Exhibit A demonstrates, while there have been some price reductions in satellite cable programming, the differentials between the sample HSD rates and even

the highest cable rates of some programmers are remarkable and, it is submitted, unjustifiable.

HSD is also impeded by common contractual requirements that the HSD packager achieve full penetration of its subscriber base (i.e., that the service be included in every package offered to consumers). Undoubtedly, some programmers may assert that their HSD rate cards contain, at the lowest possible level, rates which are comparable to the top of the cable rate card. However, in reality, the Packagers can never reach those levels and they - and their customers - will continue to be penalized for the nature of the market they serve. The nature of the HSD market is fundamentally different from the cable market. Rather than having an exclusive franchise on each HSD subscriber, the Packagers compete with as many as twenty other packagers and, in most cases, the subscribers buy their programming from multiple sources and, because of the technology, enjoy the ability to pick and choose their service. On average, the HSD consumer purchases her or his programming from about 2.5 different outlets. As a result, it is not feasible for the HSD packager to include all programming services in every package or with every sale. To do so would result in duplication of subscriptions and overpayment by the consumer. Nevertheless, in many cases, the HSD packager is required to attain unrealistic penetration levels and extremely high subscriber levels in order to enjoy programming rates which are at or near cable rates.

IV. Information Required For More Comprehensive Analysis

Just as the Commission is urged to closely examine the "real" HSD rates, it should also look closely at "real" cable operator rates. If examined superficially, cable rate cards and, in the case of superstation carriers, tariff rates may appear to be closer to HSD rates than they are in application. Grandfathered cable rates (locking in rates in existence prior to the effective date of the 1992 Act and the Rules), special marketing allowances, and caps on overall subscriber liability may greatly affect the competitive analysis. While a tariff may seem to impose a cable rate of X, limitations on the number of subscribers for which the cable operator is actually liable result in a real rate of Y - which is often a small fraction of X. Likewise, a programmer may be able to present a current cable rate card which ignores the millions of cable subscribers served by MSOs operating under long term, pre-1993 agreements which provide significantly lower rates.

The Commission is urged to call for the presentation of extensive pricing data from all programming vendors. Not just rate cards, form contracts, or tariffs, but actual pricing data from all contracts, including rates for cable, SMATV, MMDS, and DBS. The Commission is also urged to require programming vendors to provide detailed information which the vendors claim in support of the differentials between HSD and other distribution technologies. Specifically, the Commission is urged to review any cable contracts and tariffs which may have been grandfathered or extended after passage of the 1992 Act. It is believed that in certain cases, cable operators received contract or tariff extensions well beyond the effective date of the Rules so that their rates are locked-in at the old discriminatory levels. Only when all such information is presented and fully dissected will the Commission have an accurate picture of competition in the video marketplace.

V. Damages and Retroactive Applicability of Rate Rollbacks

The Commission is also urged to recognize the importance of providing an adequate incentive for programming vendors to comply with the provisions of the program access requirements of the 1992 Act and the Rules. That incentive must be a clear statement by the Commission that in programming access complaints the remedies will include retroactive rate rollbacks to November 15, 1993 or the effective date of the contract, whichever is later, and attorneys fees. In the absence of such a "stick", there is minimal incentive for a programmer to negotiate in response to an HSD packager's complaints.

VI. Conclusion

The Packagers and other HSD packagers are truly no different than cable operators in terms of the services they perform. It is submitted that the cost of serving the HSD packager is no greater, if not less, than the cost of serving cable. The Packagers do not believe that there can be any reasonable justification for price differentials between HSD and other technologies. HSD packagers market the programming, make the sale, collect payments, authorize and deauthorize the services, and provide all customer service. The programmer receives payment for the subscribers from the HSD packager and can easily verify the number of subscribers through the DBS Center in San Diego. The Packagers receive only a fraction of the

marketing support and assistance received by cable operators. In fact, they submit that HSD rates should, on the basis of costs, be lower than cable. The fact that some programmers have been able to reduce HSD rates down to levels which are at or near cable rates should be examined in response to those programmers who may claim that price reductions are not possible because of higher costs to serve the HSD market.

The Commission and Congress are commended for having made it possible for the Packagers and other HSD packagers to make some gains in the area of programming access and pricing. However, the process is just beginning. The Commission must ensure that there will be a competitive video marketplace, and the best way to meet that goal is to ensure the ready availability of video programming on fair and non-discriminatory terms. The Commission must vigorously and comprehensively examine every element of programming pricing for all technologies and provide aggrieved parties with an attentive and efficient forum for the review of complaints and provide adequate remedies when violations occur.

Respectively submitted,
Consumer Satellite Systems, Inc.
Programmers Clearing House, Inc.
Satellite Receivers, Ltd.

A handwritten signature in black ink, appearing to read 'Mark C. Ellison', is written over a horizontal line.

June 29, 1994

by: Mark C. Ellison, Esq.
Hardy & Ellison, P.C.
Suite 100
9306 Old Keene Mill Road
Burke, VA 22015
703-455-3600

EXHIBIT A

PROGRAMMING SERVICE (MSO Interest)	1994 ESTIMATED CABLE RATE ¹ (Top of Rate Card)	APPROX. % CHANGE IN HSD RATE SINCE 1992 CABLE ACT	"SAMPLE" HSD RATE AS A % OF CABLE RATE
All News Channel (Viacom)	0.17	0	+352%
AMC/Bravo (TCI/Cablevision)	0.40	-50%	+157%
BET (TCI/Time-Warner)	0.10	N/A	N/A
BRAVO (TCI/Cablevision)	0.23	-19%	+195%
Cartoon (TCI/Time-Warner, et al.)	0.11	0	+227%
Cinemax (Time-Warner)	3.85	+4%	+158%
Comedy Central (Time-Warner/Viacom)	0.12	+13.6%	+208%
CNN/Headline News (TCI/Time-Warner, et al.)	0.38	-35%	+210%
Court TV (Time-Warner)	0.16	N/A	N/A
Discovery (TCI)	0.15	-46%	+114%

¹ Cable rates are from Paul Kagan Programming Newsletter, April 30, 1993.

PROGRAMMING SERVICE (MSO Interest)	1994 ESTIMATED CABLE RATE ¹ (Top of Rate Card)	APPROX. % CHANGE IN HSD RATE SINCE 1992 CABLE ACT	"SAMPLE" HSD RATE AS A % OF CABLE RATE
ESPN (None)	0.44	0%	+280%
Family Channel (TCI)	0.17	-5%	+165%
HBO (Time-Warner)	4.00	-5%	+145%
Learning Channel (TCI)	0.09	N/A	N/A
Lifetime (None)	0.16	0	+281%
Movie Channel (Viacom)	3.80	-8%	+160%
MTV/VH1 (Viacom)	0.36	-73%	+160%
Nick (Viacom)	0.28	-70%	+200%
Showtime (Viacom)	3.80	-8%	+160%

PROGRAMMING SERVICE (MSO Interest)	1994 ESTIMATED CABLE RATE ¹ (Top of Rate Card)	APPROX. % CHANGE IN HSD RATE SINCE 1992 CABLE ACT	"SAMPLE" HSD RATE AS A % OF CABLE RATE
TNN (Gaylord)	0.30	-46%	0%
WTBS	0.10	-25%	+460%
WGN	0.10	-15%	+490%
KTLA	0.10	-8%	+425%

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